

# memorandum

53905

DATE:

MAY 03 1995

REPLY TO

ATTN OF:

ER:JDW:08181

SUBJECT:

Site Buffer Zone Mining Proposal

TO:

Thomas P. Grumbly, Assistant Secretary for Environmental Management, EM-1, HQ

**ISSUE:** A local mining company, Western Aggregates, Inc. (WAI), has proposed expansion of their current mining operation further into the Rocky Flats buffer zone and in direct conflict with the habitat of the Prebles Meadow Jumping Mouse.

**BACKGROUND:** The Rocky Flats Environmental Technology Site (Site) owns the surface rights in the buffer zone, but the mineral rights are held by private parties. WAI is seeking approval from state and county officials to expand mining operations in the buffer zone. Also, the U.S. Fish and Wildlife Service is evaluating a petition to list the Prebles Meadow Jumping Mouse (Mouse) as a "threatened or endangered species." The Mouse is found in all four major drainage systems of the Site and within the proposed mining expansion area.

**DISCUSSION:** The Rocky Flats Field Office is working with the local communities and interest groups to resolve this issue through the Rocky Flats Future Site Use Working Group. The Working Group was formed as an independent entity by the Rocky Flats Local Impacts Initiative in the spring of 1994 to provide DOE with recommended Rocky Flats land use options by mid-1995.

**RECOMMENDATION:** Maintain a neutral position on the WAI rezoning application. Support the Working Group recommendations and respect legalities associated with balancing WAI mining operations and Mouse habitat preservation concerns.

**NEXT STEPS:** On or about June 16, 1995, RFFO will have sufficient information on mineral rights values, potential hydrologic impacts and analysis of costs to fully assess possible liabilities to DOE and determine best course of action. RFFO is pursuing the development of a Conservation Management Plan for the Preble's Meadow Jumping Mouse. DOE will comment to Jefferson County on the requested mining rezone just as any other interested party.

**IMPACTS:** RFFO will continue to perform activities at the Site in a manner which does not jeopardize the continued existence of the Mouse or its habitat, while not interfering with the property rights of the mineral rights owner. The attached issue paper further explains the buffer zone mining proposal and recommended course of action for your information.



Mark N. Silverman  
Manager

Attachment

ADMIN RECORD

A-SW-001558

cc w/ Attachment:

D. Pearman, FM-1, HQ

C. Kelly, EM-5, HQ

K. Klein, OOM, RFFO

J. Roberson, AMER, RFFO

T. Anderson, SSS, RFFO

D. Lindsay, OCC, RFFO

T. Healy, EG&G

D. Shain, EG&G

Administrative Record

MAY 03 1995

## Attachment

### ROCKY FLATS FIELD OFFICE BUFFER ZONE MINING PROPOSAL

**Issue:** A local mining company (Western Aggregates, Inc.) has proposed expansion of their current mining operation further into the Rocky Flats buffer zone and in direct conflict with the habitat of the Prebles Meadow Jumping Mouse.

**Background:** DOE owns surface rights for the 6200 acre buffer zone surrounding the Rocky Flats industrial area. Ninety-four percent of the mineral rights in the buffer zone are held in private ownership. Some of these mineral rights are being pursued for expanded mining operations. Western Aggregates, Inc. (WAI) has petitioned 1) the State to amend the existing permit to include an additional 425 acres of buffer zone for the extraction of sand and gravel, and 2) the County to rezone the area to allow mining.

The U.S. Fish and Wildlife Service (the Service) received a petition in August of 1994 to list the Preble's Meadow Jumping Mouse (the Mouse) as a Threatened or Endangered Species. The Mouse has been found (e.g. live trapped) in all four major drainage systems in the buffer zone. The DOE is completing a Conservation Management Plan for the mouse and its potential habitat. Accordingly, some activities in these potential habitat areas may need to be modified or restricted. Some of the potential habitat covers land that already is permitted for mining. In addition, the County has verbally stated that it will treat DOE as a coapplicant on the WAI rezoning application for mining (to limit County liability on the issue). The DOE has declined to be a coapplicant and has maintained a neutral position to date.

**Discussion:** Rocky Flats Field Office (RFFO) has to date supported co-existence of mining operations while also protecting the Mouse. This position was stated in letters to both the County and the State as "The Department of Energy shall neither support nor hinder the rezoning action." The County is not expected to initiate action on the mining permit until May of this year. The mining company does have to make a lease payment on the mineral rights in May 1995, but will undoubtedly want to have adequate progress on the application soon. Under Colorado law, both the mineral owner and surface owner have rights to use their property. Mineral owners must work with surface owners to mitigate any impacts.

#### Options:

1. Purchase the mineral rights in the affected area.

**PRO:** Provides greater protection for the Mouse than relying on others to take the necessary conservation steps. In addition, ownership of the mineral rights by DOE would give DOE more control over the future use of the buffer zone.

**CON:** Cost to purchase the minerals under the 425 acres could be as high as \$20,000,000 in a time of shrinking budgets. A real estate appraisal for the minerals (425) acres is being contracted at this time. Purchase of the minerals could set a precedent where other mineral owners may request that DOE purchase their minerals. The State and County have full authority to preclude mineral operations via denial of the requested permits or rezoning actions. Both entities are represented on the future Site Use Working Group and can influence future land use decisions.

2. Support the WAI rezoning application filed with the County and the mining permit filed with the State. In addition, work with the Service, WAI, the State and the County to develop measures agreeable to the parties to preserve the Mouse and its habitat during the mining. DOE would be a signatory on the WAI rezoning application.

PRO: Reaching a mutually agreeable solution between WAI, DOE and the Service, fostering goodwill with WAI, allowing the mining with some restrictions.

CON: DOE support for the application may be construed as an "agency action" which may jeopardize the Mouse under the Endangered Species Act. Also, support could be construed as a "major federal action" under National Environmental Policy Act (NEPA). Further, the Service has indicated it may consider an emergency listing of the Mouse if DOE (or WAI) takes any action which threatens the Mouse or its habitat. May prompt suits from citizens' groups interested in preserving the Mouse.

3. Oppose the WAI rezoning application filed with the County and the mining permit filed with the State to support the Mouse and its habitat.

PRO: This position is intended to prompt the County and State to deny the rezoning application and the mining permit, respectively, in order to provide greater protection for the Mouse. This position also gives DOE greater options for future uses of the site if the application was denied.

CON: May cause WAI to initiate legal action against DOE for inverse condemnation of its mineral interests. May result in other subsurface owners requesting compensation. The "inverse action" may include land that already is permitted and zoned for mining. The value of the acquisition could be higher for this reason.

4. Maintain a neutral position regarding the WAI rezoning application.

PRO: Avoids the potential liabilities identified above resulting from supporting or opposing the rezoning application. DOE would avoid the liability incident to a "taking" of WAI's mineral interests if DOE were to oppose the application. Also, DOE would avoid the argument it has taken an "agency action" under ESA, a "major federal action" under NEPA, the potential emergency listing of the mouse by the Service, and potential suits by citizens' groups if DOE supported application. This position does not preclude negotiating with WAI and the Service to develop a mining plan which is amicable to the parties. It will reduce the potential for other subsurface mineral holders to request that DOE purchase their mineral interests.

CON: The Service has stated that this position may result in inadequate protection for the mouse. The Service may pursue an emergency listing in response to this position.

**Recommendation:** Maintain a neutral position regarding the WAI rezoning application.

**Next Steps:** By maintaining a neutral position, DOE will continue to assess and evaluate information on impacts and available alternatives in a responsible manner. On or about June 16, 1995, RFFO will have sufficient information on mineral rights values and analysis of costs to fully assess the option to purchase the mineral interests for the WAI lease only. We will evaluate potential hydrologic impacts and develop an assessment of possible liabilities to DOE to recommend one of the listed options (or a new one). The DOE RFFO is pursuing the development of a Conservation Management Plan for the Preble's Meadow Jumping Mouse. This Plan is between DOE and the Service, and will provide general guidelines for protecting and/or mitigating any potential impacts to the mouse and its habitat from DOE controlled actions. Finally, the DOE will comment to Jefferson County on the requested rezone just as any other interested party or comments will be sent to the Colorado Mined Land Reclamation Board concerning its permitting process.